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No. 84-526

In the Supreme Court of the United States

OCTOBER TERM, 1984

GORDON PENNELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion in denying a mistrial after determining that each juror was capable of rendering a fair and impartial verdict even though five jurors had received an anonymous telephone call urging conviction.

2. Whether the district court should have granted use immunity to a defense witness who invoked his Fifth Amendment privilege against self-incrimination.

3. Whether petitioner was properly convicted for attempting to possess cocaine with intent to distribute it, when the substance he purchased was in fact sham cocaine.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A95) is reported at 737 F.2d 521.

JURISDICTION

The judgment of the court of appeals was entered on June 8, 1984, and a petition for rehearing was denied on July 31, 1984. The petition for a writ of certiorari was filed on September 29, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted on one count of conspiracy to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846, one count of attempting to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 846, seven

counts of unlawful use of a communications facility, in violation of 21 U.S.C. 843(b), and one count of unlawful carrying of a firearm during the commission of a felony, in violation of 18 U.S.C. 924(c)(2). Petitioner was sentenced to concurrent terms of nine years' imprisonment on the conspiracy and attempt counts, to concurrent one-year terms of imprisonment on the counts charging unlawful use of a communications facility, and to a one-year consecutive term of imprisonment on the weapons count. Petitioner also was assessed fines totalling $50,000. The court of appeals affirmed (Pet. App. A1-A95).

1. The evidence at trial is summarized in the court of appeals' opinion. Prior to September 1980, petitioner had supplied cocaine for an individual known as "Pizza Man" to sell to others. By September 1980, however, Pizza Man was $15,000 in arrears on his payments to petitioner; accordingly, petitioner ceased supplying him with cocaine and "sold" the account receivable to someone else. Pizza Man then contacted the DEA in October 1980, in hopes of receiving money in return for information. The DEA declined Pizza Man's offer and insisted instead that he testify at future trials. Pizza Man refused to comply. Pet. App. A12-A13.

In March 1981, Pizza Man again met petitioner. Although petitioner claimed that he had ceased selling cocaine, he immediately expressed interest in Pizza Man's claim that he could obtain cocaine from a Florida source for $22,500 per pound, a price that was low enough to allow both petitioner and Pizza Man to make a profit upon resale. Petitioner urged Pizza Man to have his Florida source contact petitioner's office. Pet. App. A14-A15.

Pizza Man described his meeting with petitioner to DEA agents the next day and agreed to an agent's suggestion that he supply petitioner with the telephone number of a Florida

DEA agent rather than the number of the purported Florida cocaine source. After petitioner had received the telephone number from Pizza Man, he called the undercover agent on April 21, 1981, and offered to buy cocaine. Pet. App. A15-A16.

During subsequent conversations between petitioner and the undercover agent, petitioner stated that he could sell at least one pound of cocaine immediately and possibly two pounds, but he demanded to see a sample of the cocaine. On May 12, 1981, petitioner and two undercover agents met at an airport so that petitioner could view a sample of the cocaine. After an agent showed petitioner four one-pound packages of sham cocaine, petitioner remarked that he could sell one pound immediately to a visiting acquaintance. The agent pretended, however, that another customer had an option to purchase the packages. Pet. App. A17-A18.

The next day, the agent told petitioner that the alternative buyer had not purchased the cocaine, and petitioner increased his order to two pounds. On May 14, petitioner met the agent at the Detroit airport and purchased two pounds of sham cocaine for $43,000. Petitioner was immediately arrested, and the arresting agents discovered a .38 caliber revolver concealed on his person. Pet. App. A18.

2. Two days after the case was submitted to the jury, five jurors were contacted at their homes by an anonymous telephone caller. The caller told the jurors that they should find petitioner guilty. The next morning, the five jurors informed their fellow jurors and the district court of the occurrence. The court individually questioned the five jurors. Four jurors, Wilcox, Burgess, Page, and Larson, responded that their impartiality would not be affected, but Burgess and Page indicated that Juror Saveski seemed to be

disturbed by the calls. During the court's ensuing questioning of Saveski, the latter stated four times that her impartiality would not be affected. The court then asked the entire panel a series of questions to determine whether the telephone calls would inhibit their deliberations. The jurors' answers satisfied the court that their impartiality remained unimpaired, and the court ordered the jury to resume its deliberations. Pet. App. A42-A44.

After the jury resumed deliberations, the forewoman sent a note to the district judge informing him that juror Linda Lorenz had indicated that the phone calls would influence her judgment. The judge immediately summoned Lorenz to the courtroom. In response to questioning, Lorenz stated that she was nervous about the telephone calls, but she replied five times that the calls would not affect her deliberations or her verdict. The court next inquired whether Lorenz was concerned about her safety. Lorenz replied that she was unsure whether her nervousness about her own safety would prevent her from continuing deliberations, but she believed that she could continue if she had some assurance that "nothing is going to become of all this." The court replied that it believed nothing would happen and stated that it had "initiated some processes on this matter." Pet. App. A44-A46.

Thereafter, the district court denied petitioner's motion for a mistrial. The court was satisfied that juror Lorenz would "confine her assessment of the facts in this case to the testimony of the witnesses, the exhibits * * * and the instructions." As to the jury as a whole, the court was satisifed that the jurors desired to continue their deliberations and that the telephone calls would not play any part in their decision. The court further found that the verdict would not be tainted by the telephone calls. The court did offer the jurors the opportunity to be sequestered, but they declined the offer and deliberated for three more days without incident before returning a verdict. Pet. App. A46-A49.

3. The court of appeals affirmed, one judge dissenting. The court first rejected petitioner's contention that he could not be convicted of attempting to possess cocaine with intent to distribute it because the substance he purchased from the undercover agents was sham cocaine. The court concluded that Congress intended to preclude a defense of impossibility in such circumstances and that a defendant may properly be convicted so long as proof of the defendant's objective conduct corroborates the necessary subjective intent to sell actual narcotics. Pet. App. A19-A25.

The court also rejected petitioner's contention that the district court should have granted use immunity to a defense witness who invoked his Fifth Amendment privilege against self-incrimination and refused to testify. The court unequivocally rejected the notion that federal courts have inherent power to immunize defense witnesses, noting the intrusion on Executive Branch prerogatives that recognition of such power would entail. Alternatively, the court held that, even if the federal courts do have inherent authority to grant immunity to defense witnesses, such authority would not have been properly exercised in this case. The witness for whom petitioner requested immunity would have testified, inter alia, that *he* had never personally observed petitioner engaging in narcotics transactions; he would not have been able to rebut the testimony of the informant and the DEA agents that petitioner "willingly and enthusiastically" attempted to purchase two pounds of cocaine with intent to distribute it. Thus, the witness could not have given "clearly exculpatory" testimony, and some of his testimony would have been cumulative. Under these circumstances, the court held that a judicial grant of immunity would have been inappropriate. Pet. App. A25-A40.

Finally, the court held that the district court had not abused its discretion in refusing to grant petitioner's motion for a mistrial made in connection with the jury tampering

incident. The court recognized that *Remmer* v. *United States*, 347 U.S. 227 (1954), applied a standard of presumptive prejudice to cases of jury tampering. The court nonetheless concluded that this Court's recent decision in *Smith* v. *Phillips*, 455 U.S. 209 (1982), abolished the presumptive prejudice standard and substituted a rule requiring the defendant to demonstrate that unauthorized communications with jurors resulted in actual juror partiality. The court also concluded, based on *Phillips*, that a district court may rely on juror assurances of impartiality in determining whether actual bias exists. Applying this rule to the facts of this case, the court held that, in light of repeated juror assurances that the calls would not affect their impartiality, the district court had not abused its discretion in holding that petitioner had failed to demonstrate actual prejudice requiring a mistrial. Pet. App. A41-A67.

Judge Celebrezze dissented. In his view, the rule established in *Remmer* is that the defendant has the burden of proving prejudice, but the defendant is aided by a presumption that prejudice did occur. The government then bears the burden of coming forward with evidence to rebut that presumption. Judge Celebrezze concluded that *Phillips* did not alter this rule. Rather, *Phillips* merely rejected the use of a conclusive presumption of prejudice under circumstances that were "not extreme." In such instances, a *Remmer* hearing, at which the defendant is aided by a presumption of prejudice, is sufficient to determine whether juror bias exists. Judge Celebrezze then concluded that the *Remmer* hearing in this case was "defective" because there was no evidence in the record to suggest that the district court applied a presumption of prejudice. Accordingly, Judge Celebrezze would have reversed petitioner's conviction. Pet. App. A86-A95.

ARGUMENT

1. Petitioner first contends (Pet. 12-21) that the anonymous telephone calls intimidated the jurors during deliberations, creating a "presumption of prejudice" that was not overcome at the subsequent *Remmer* hearing. On the facts of this case, petitioner's contention is without merit.

We do not dispute petitioner's contention (Pet. 14-15) that the majority below misread *Phillips* when it concluded that that decision overruled *Remmer's* presumption of prejudice. As Judge Celebrezze correctly noted (Pet. App. A92-A94), *Phillips* did not address the presumption of prejudice at all, but instead held only that "imputed bias" could not suffice for a showing of actual bias. At the same time, however, we cannot agree with petitioner that a correct reading of *Phillips* would have altered the result in this case.[1] The presumption established in *Remmer* does not mandate an automatic new trial; rather, the presumption does no more than establish the need for a hearing at which the district court must make the ultimate determination of whether the jury is actually biased. See, *e.g., United States* v. *Williams*, 737 F.2d 594, 612 (7th Cir. 1984) (anonymous telephone calls urging conviction did not prejudice defendant).

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[1]Petitioner relies (Pet. 20) on the majority's statement (Pet. App. A56) that it would have been "hard pressed" to affirm petitioner's conviction were "*Remmer, Ferguson* and *Stone* controlling." In context, it is clear that the court was referring not to *Remmer's* presumption of prejudice alone, but to its own prior decisions in *United States* v. *Ferguson*, 486 F.2d 968 (6th Cir. 1973), and *Stone* v. *United States*, 113 F.2d 70 (6th Cir. 1940), in which it had refused to accept juror assurances of impartiality as sufficient to overcome the presumption of prejudice established in *Remmer*. The court below correctly concluded that *Phillips* did effectively overrule these prior decisions (see 455 U.S. at 217 n.7), and thus there is no merit to petitioner's claim that the court would have reversed his conviction had it correctly understood *Remmer's* presumption of prejudice.

Such a hearing was held in this case, and the district court fully complied with the teachings of *Remmer* and *Phillips*. The district court carefully questioned each of the jurors and satisfied itself that the telephone calls would not affect any juror's ability to render a fair and impartial verdict. There was, of course, no error in the district court's reliance on the jurors' statements concerning their ability to render a fair and impartial verdict, *Phillips*, 455 U.S. at 217 n.7, and the district court was in the best position to assess their ability to continue their deliberations. Thus, whether or not the district court initially considered the calls to be "presumptively prejudicial" is of no import once the court found that no actual bias existed.[2]

As a practical matter, it is difficult to see what more a district court can do to ascertain whether an incident of this nature has been prejudicial than to hold a hearing, listen to and observe the jurors, and determine whether their assurances that they will be able to proceed with their deliberations uninfluenced by the incident are credible. What petitioner really seeks, therefore, is the recognition of an irrebuttable presumption of prejudice, with an absolute

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[2]Although the record does not explicitly show that the district court treated the calls as presumptively prejudicial, the court's response to the calls suggests that it did. As soon as it learned of the calls, the court undertook the hearing mandated by *Remmer* and made the necessary findings with respect to each juror's ability to continue deliberations. The fact that the court ultimately concluded that there was no actual bias in no way suggests that the hearing was "defective" (Pet. App. A95). Moreover, it bears note that the district court had already once before declared a mistrial in this same case after becoming convinced that a juror's conduct had so tainted the appearance of objectivity that the parties and the public could not be assured that a verdict would be rendered on the evidence. XVI Tr. 46. Thus, the court was clearly capable of distinguishing actual prejudice from presumed prejudice that, upon investigation, turned out to be harmless.

right to secure a mistrial. Nothing in *Remmer* requires such a result.[3]

2. Petitioner next contends (Pet. 21-26) that the district court erred in not judicially immunizing a proposed defense witness. Petitioner claims that district courts have inherent power to grant immunity and that that power should have been exercised in this case. Petitioner's argument is without merit.

The decision whether or not to confer immunity on a witness is entrusted to the Executive Branch and is ill-suited for consideration by the courts. See *United States* v. *Doe*, No. 82-786 (Feb. 28, 1984), slip op. 11; *Pillsbury Co.* v. *Conboy*, 459 U.S. 248, 261-262 (1983). The courts of appeals have concluded overwhelmingly that the judiciary is not authorized to immunize witnesses, and this Court has consistently declined review of such decisions.[4]

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[3]We must also observe in this connection that it is the defense, not the prosecution, that ordinarily benefits from a mistrial and that is more likely to have motivation to take action to precipitate a mistrial. While there is no showing in this case who was responsible for the calls to the jurors, it is not hard to foresee a considerable increase in such untoward incidents if their occurrence would lead to virtually automatic mistrials.

[4]See, *e.g.*, *United States* v. *Todaro*, No. 84-1086 (2d Cir. Sept. 11, 1984), slip op. 6201-6205; *United States* v. *Taylor*, 728 F.2d 930, 933-936 (7th Cir. 1984); *United States* v. *Gottesman*, 724 F.2d 1517, 1523-1524 (11th Cir. 1984); *United States* v. *Hardrich*, 707 F.2d 992, 993-994 (8th Cir. 1983), cert. denied, No. 82-6986 (Nov. 28, 1983); *Autry* v. *Estelle*, 706 F.2d 1394 (5th Cir. 1983), cert. denied, No. 83-5720 (Mar. 13, 1984); *United States* v. *Heffington*, 682 F.2d 1075, 1080-1081 (5th Cir. 1982), cert. denied, 459 U.S. 1108 (1983); *United States* v. *Hunter*, 672 F.2d 815, 818 (10th Cir. 1982); *United States* v. *Thevis*, 665 F.2d 616, 638-641 (5th Cir.), cert. denied, 456 U.S. 1008 (1982); *United States* v. *L'Hoste*, 640 F.2d 693, 695 (5th Cir. 1981); *United States* v. *Herbst*, 641 F.2d 1161 (5th Cir.), cert. denied, 454 U.S. 851 (1981); *United States* v. *Karas*, 624 F.2d 500, 505 (4th Cir. 1980), cert. denied, 449 U.S. 1078 (1981); *United States* v. *Turkish*, 623 F.2d 769, 771-779 (2d Cir. 1980),

As petitioner points out (Pet. 22), the Third Circuit has held that district courts have the authority to order immunity for prospective defense witnesses in exceptional circumstances. See *Government of the Virgin Islands* v. *Smith*, 615 F.2d 964 (3d Cir. 1980). The Third Circuit stands alone in so holding and has never applied its holding to any case since *Smith*. Moreover, as noted above, this Court has repeatedly declined to review the issue notwithstanding the divergent view of the Third Circuit; no different result is called for here. In any event, petitioner could not prevail even under the Third Circuit's standard. By its terms, the Third Circuit's rule is applicable only where, among other requirements, "the defendant * * * make[s] a convincing showing * * * that the testimony which will be forthcoming is both clearly exculpatory and essential to the defendant's case." *Smith*, 615 F.2d at 972. Here, as the court of appeals concluded (Pet. App. A38-A40), the proffered testimony of the defense witness did not satisify these requirements.

According to petitioner (Pet. 8-9 n.1), the witness would have testified that the informant consumed large amounts of cocaine, that petitioner's only association with the informant was to help the informant discharge his debts, and that the witness had never observed petitioner become

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cert. denied, 449 U.S. 1077 (1981); *United States* v. *Lenz*, 616 F.2d 960, 962 (6th Cir.), cert. denied, 447 U.S. 929 (1980); *United States* v. *Klauber*, 611 F.2d 512, 517-520 (4th Cir. 1979), cert. denied, 446 U.S. 908 (1980); *United States* v. *Richardson*, 588 F.2d 1235, 1241 (9th Cir. 1978), cert. denied, 440 U.S. 947 (1979); *In re Daley*, 549 F.2d 469, 479-480 (7th Cir.), cert. denied, 434 U.S. 829 (1977); *United States* v. *Graham*, 548 F.2d 1302, 1315 (8th Cir. 1977); *United States* v. *Caldwell*, 543 F.2d 1333, 1356 n.115 (D.C. Cir. 1974); *United States* v. *Alessio*, 528 F.2d 1079, 1081-1082 (9th Cir.), cert. denied, 426 U.S. 948 (1976); *Thompson* v. *Garrison*, 516 F.2d 986, 988 (4th Cir.), cert. denied, 423 U.S. 933 (1975); *United States* v. *Allstate Mortgage Corp.*, 507 F.2d 492, 494-495 (7th Cir. 1974), cert. denied, 421 U.S. 999 (1975); see also Note, *The Case Against a Right to Defense Witness Immunity*, 83 Colum. L. Rev. 139 (1983).

involved in a narcotics transaction. Hence, the witness's testimony would have related only to the informant's credibility and not to petitioner's guilt or innocence, and it would have done little to rebut the evidence against him. Thus, this case is a far cry from the unique situation in *Smith*, in which the Third Circuit concluded that a judicial grant of immunity for a defense witness would have been appropriate.[5]

3. Finally, petitioner argues (Pet. 28-37) that his conviction for attempting to possess a controlled substance that was not, in fact, a controlled substance was legally impossible and contrary to congressional intent. Petitioner's argument lacks merit.

First, the legislative history of the attempt provision of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. 846, demonstrates Congress's intent to eliminate the impossibility defense. The Third Circuit thoroughly reviewed this history in *United States* v. *Everett*, 700 F.2d 900 (1983). As the court there noted, the original Senate version of the attempt provision employed the word "attempt." That bill was amended to substitute the word "endeavor" for "attempt" in order to eliminate the "impossibility" defense. S. 3246, 91st Cong., 1st Sess. § 504 (1970); S. Rep. 91-613, 91st Cong., 1st Sess. 26 (1969). The House considered a similar bill that also contained the word "endeavor." H.R. 17463, 91st Cong., 2d Sess. § 504 (1970). A new bill was then introduced in the House to add an additional title dealing with drug addiction; the new bill

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[5]In *Smith*, the defendant requested the court to confer immunity on an exculpatory witness, a juvenile subject to the exclusive jurisidiction of local Virgin Islands authorities. The local authorities offered the witness immunity, but, as a matter of prosecutorial courtesy, stated that the offer was conditioned on the consent of the United States Attorney. The United States Attorney, who had no jurisdiction over the juvenile in any event, inexplicably refused to consent to the proposed grant of immunity by the local authorities. 615 F.2d at 967.

used the word "attempt" instead of the word "endeavor." H.R. 18583, 91st Cong., 2d Sess. § 506 (1970). House members were advised, however, that both House bills punished the same conduct, and the new bill eventually passed the House and Senate. See *Everett*, 700 F.2d at 906. Hence, the reassurance that "endeavor" and "attempt" were to be used interchangeably, together with Congress's manifest determination to tighten the drug laws (*id.* at 906-907), led the court in *Everett* and the court below to the correct conclusion that Congress intended to eliminate the impossibility defense from the attempt provision (Pet. App. A20-A21).[6]

Petitioner also claims (Pet. 34-37) that the courts of appeals are in conflict over what the government must prove in an attempt case when the substance intended to be purchased is not a controlled substance. Contrary to petitioner's analysis, however, the court below and other courts of appeals are in agreement that the government must prove objective acts performed by the defendant sufficient to show criminal conduct, without reliance on the defendant's subjective intent. See Pet. App. A21-A22; *Everett*, 700 F.2d at 909; *United States* v. *Innella*, 690 F.2d 834, 835 (11th Cir. 1982), cert. denied, 460 U.S. 1071 (1983); *United States* v. *Oviedo*, 525 F.2d 881, 885 (5th Cir. 1976). Here, as the court below concluded, petitioner's conduct, which included a request for sample cocaine and the payment of $43,000 for two pounds of a white powdery substance resembling cocaine, clearly permitted the jury to conclude beyond a reasonable doubt that petitioner intended to purchase real cocaine.

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[6]Other courts of appeals also have rejected the impossibility defense to attempt charges under 21 U.S.C. 846. See *United States* v. *Innella*, 690 F.2d 834, 835 (11th Cir. 1982), cert. denied, 460 U.S. 1071 (1983); *United States* v. *Quijada*, 588 F.2d 1253, 1254-1255 (9th Cir. 1979); *United States* v. *Hough*, 561 F.2d 594, 595-596 (5th Cir. 1977); *United States* v. *Marin*, 513 F.2d 974, 976 (2d Cir. 1975).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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